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Supreme Court, U.S.
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No. 95-519

In The

Supreme Court of the United States

October Term, 1995

ANDY CHAVEZ and ISABEL CHAVEZ, husband and wife,

Petitioners,

vs.

COPPERSTATE RUBBER OF ARIZONA, INC., an Arizona corporation; JOYCE GRIMES and JOHN DOE GRIMES, wife and husband,

Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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24 pp

QUESTIONS PRESENTED

1. Whether a supervisor's common law wrongful discharge and intentional interference with contract claims are preempted by the National Labor Relations Act where the gravamen of the supervisor's claims is that he was discharged because he refused to discriminate against union members.

2. Assuming such preemption, whether the supervisor's breach of contract claim is also preempted by the National Labor Relations Act where the same conduct that constitutes the alleged breach of contract also constitutes the unfair labor practice.

LIST OF PARTIES

Petitioners Andy Chavez and Isabel Chavez are individuals.

Respondent Joyce Grimes is an individual. Respondent Copper State Rubber of Arizona, Inc. is a wholly-owned subsidiary of The Gar Company d/b/a Specialties Co. Respondent Copper State Rubber of Arizona, Inc. has no subsidiaries. The Gar Company d/b/a Specialties Co. has no other subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Copper State Rubber of Arizona, Inc. ("Copper State") and Joyce Grimes, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Andy and Isabel Chavez.

STATUTES AND REGULATION INVOLVED

In addition to those statutes cited by Petitioners, Respondents submit the following regulation to this Court:

29 C.F.R. § 101.2 (1989-1995) provides as follows:

> **§ 101.2 Initiation of unfair labor practice cases.**
>
> The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of the person's knowledge and belief. The charge is filed with the Regional Director for the Region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the Regional Office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

STATEMENT OF THE CASE

Andy Chavez worked for Copper State from 1978 until April of 1990, serving in a supervisory position for the last nine years of his employment. In late 1989, employees at Copper State voted to establish a union. According to Chavez, Respondent Joyce Grimes, manager of Copper State when Chavez's employment there ended, instructed Chavez to treat non-union employees more favorably than union employees. When Chavez refused, Grimes allegedly accused Chavez of being disloyal to the company and supporting the union. Copper State and Grimes

gave Chavez three options: resign, be laid off with good references or be terminated. After Chavez was allowed time to consult an attorney, he returned to work, at which time Grimes presented Chavez with a warning report reprimanding him. Chavez refused to sign the reprimand; the parties dispute whether he then quit or was terminated.

Andy Chavez and his wife Isabel Chavez ("Chavez") brought this action in Arizona state court, alleging breach of contract, wrongful discharge and intentional interference with contract. In the allegations common to all counts, Chavez alleges that "Grimes told [Chavez] that he should discriminate and make life hard for those supporting the union, but he should not criticize or discipline non-union employees for improper performance of their jobs"; that "[Chavez] protested this directive"; and that "Grimes falsely accused [Chavez] of supporting the union and being disloyal to management." Chavez asserts that (1) Copper State breached his contract of employment by terminating him without cause; (2) Copper State and Grimes wrongfully terminated him in retaliation for refusing to coerce employees not to join the union; and (3) Grimes wrongfully interfered with his employment contract with Copper State.

Respondents moved for summary judgment on the grounds that, *inter alia*, the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(3) ("the Act"), preempts all of Chavez's claims. The trial court initially denied the motion. Copper State and Grimes moved for reconsideration, conceding for purposes of the motion that Chavez was a supervisor and that Copper State had discharged him for refusing to commit unfair labor practices. Upon reconsideration, the trial court concluded that the Act preempts Chavez's claims for wrongful discharge and intentional interference with contract and entered judgment for Respondents on those claims pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure. Chavez appealed. The trial court limited

Chavez's breach of contract claim to grounds other than refusing to engage in unfair labor practices. Copper State and Grimes cross-appealed on the basis that the Act also preempts the breach of contract claim.

The Arizona Court of Appeals affirmed summary judgment for Copper State and Grimes on the wrongful discharge and interference with contract claims. *See* Opinion at Appendix A to Petition; the decision is reported at 897 P.2d 725 (Ariz. Ct. App. 1995). The court first concluded that Chavez's discharge came within the purview of the Act notwithstanding his status as a supervisor. Next, the court reasoned that the gravamen of each of Chavez's theories is that he was discharged due to his refusal to treat non-union employees more favorably than union employees. Because the conduct of Copper State and Grimes that Chavez put at issue arguably constitutes an unfair labor practice under the Act, the court held that the claims were preempted by federal labor law.

The Arizona Court of Appeals further held that Chavez's breach of contract claim was also preempted by the Act because, regardless of the theory under which he seeks to proceed, the basis for his claim remains conduct that arguably constitutes an unfair labor practice. As the crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice were found to be the same in all fundamental respects, the jurisdiction of the National Labor Relations Board was held to preempt state court jurisdiction as to all of Chavez's claims.

Chavez's petition for review was denied by the Arizona Supreme Court. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

The Court should decline to accept jurisdiction of the Petition because this case does not present important issues of federal law. Rather, Petitioners merely ask this Court to revisit questions that were settled long ago. In addition, the Arizona Court of Appeals properly stated the rule of law, and properly applied that rule, in holding that where the crucial elements of an employee's state law claims and the showing to establish an unfair labor practice are the same in all fundamental respects, preemption of the employee's claims is required by the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(3).

I.

THAT SUPERVISORS' CLAIMS MAY BE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT IS BOTH WELL-ESTABLISHED AND NECESSARY TO FURTHER THE PURPOSES OF THE PREEMPTION DOCTRINE.

The Petition suggests that certiorari is appropriate because "clear and understandable boundaries" are needed to define the scope of the Act's preemptive effect and because preemption of a supervisor's claims is unwarranted as the Act provides no "direct" protection for supervisors. (Petition at 6-7.) Neither of these reasons withstands scrutiny.

A. The Act Prohibits An Employer From Disciplining A Supervisor For Refusing To Commit An Unfair Labor Practice.

What the Petition ignores is that this Court has already established "clear and understandable" boundaries governing preemption under the Act and that those boundaries plainly include claims of supervisors who have been disciplined for

refusing to commit an unfair labor practice. The Arizona Court of Appeals first ruled that Chavez's claims for wrongful discharge and intentional interference with contract were preempted by the National Labor Relations Act, 29 U.S.C §§ 158(a)(1) and (a)(3) (the "Act"), under the doctrine established in *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959).[1] This Court's precedent required preemption because, as the Arizona court correctly reasoned, the "crucial element" that was required to establish Chavez's claims was the *same* element that was central to proving an unfair labor practice under the Act:

> Regardless of the label attached to his claims, *Chavez cannot establish wrongful discharge or improper interference with his employment contract without showing the same crucial element as would be essential to establishing an unfair labor practice*: he must show Copper State discharged him, or Grimes obtained his discharge, because he refused to discriminate against union members. That element is of more than peripheral concern to federal labor law; it reflects and requires consideration of a central focus of the Act.

Appendix A at A-12; 897 P.2d at 732 (emphasis supplied).

That holding is rendered neither incorrect nor exceptional simply because Chavez was a supervisor. Although a supervisor's discharge is not usually of concern to the National Labor

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1. It is not clear from the Petition whether Andy and Isabel Chavez seek to challenge the ruling below as to their intentional interference with contract claim. In any event, that claim is preempted under the *Garmon* doctrine for the same reasons that the wrongful discharge claim is preempted.

Relations Board ("NLRB") because the Act excludes supervisors from its definition of "employee," 29 U.S.C. § 152(3), the courts have carved out three exceptions to that rule. An employer's conduct toward a supervisor may violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if (1) the employer disciplines a supervisor for testifying before the NLRB or during the processing of an employee's grievance; (2) the employer disciplines a supervisor for refusing to commit an unfair labor practice; or (3) the employer discharges a supervisor who hires his own crew as a pretext for terminating his pro-union crew. *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383, 386 (D.C. Cir. 1983). As the court below held (Appendix A at A-7 through A-8; 897 P.2d at 730), Chavez's claim that Copper State discharged Andy because he refused to discriminate against union members falls squarely within the second exception, which prohibits employers from funnelling unfair labor practices through a supervisor. *Gerry's Cash Markets, Inc. v. NLRB*, 602 F.2d 1021, 1022-23 (1st Cir. 1979); *Delling v. NLRB*, 869 F.2d 1397, 1399-1400 (10th Cir. 1989).

Therefore, because an employer's discipline of a supervisor can itself constitute an unfair labor practice and thus come within the purview of the Act, supervisors' state law claims can be preempted by the sweep of the *Garmon* doctrine. For example, in *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983), a decision relied upon by the Arizona court, this Court squarely held that a *supervisor's* action for interference with his contractual relationship with his employer was preempted by the Act. Even in 1983, this Court did not find the issue to be novel because a supervisor was involved. On the contrary, the Court commented that "[n]ot only is this case a variant of a familiar theme, but we have heard this same tune before." 460 U.S. at 677, citing *Local No. 207, International Association of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701 (1963). Two decades before, this

Court had held in *Perko* that a state law claim by a foreman/ superintendent was preempted by the Act. *See also Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974) (claims of discharged supervisors brought under state right-to-work law held preempted by Section 14(a) of the Act (29 U.S.C. § 164(a)).

Lower federal and state courts have consistently followed the rule that a *supervisor's* state law claims may be preempted by the Act. *See, e.g., Kelecheva v. Multivision Cable T.V. Corp.*, 22 Cal. Rptr. 2d 453 (Ct. App. 1993) (holding a supervisor's wrongful discharge claim preempted by the Act); *Henry v. Intercontinental Radio, Inc.*, 202 Cal. Rptr. 328 (Ct. App. 1984) (same); *Sitek v. Forest City Enterprises, Inc.*, 587 F. Supp. 1381 (E.D. Mich. 1984) (same).

The law is already clear that *Garmon* preemption applies to supervisors' claims of the type asserted by Chavez here.

B. Refusing To Preempt Supervisors' State Law Claims Would Undermine The Preemption Doctrine.

Petitioners contend that preemption is improper because it deprives them of their "only real legal remedy," as the Act affords no "direct protection" for supervisors. (Petition at 6.) This argument ignores the fact that Chavez *did* have another remedy, for, as the Arizona court pointed out (Appendix A at A-14 through A-15; 897 P.2d at 733), he *could have* filed a claim with the NLRB. *See* 29 C.F.R. § 101.2; *NLRB v. Local No. 42, International Association of Heat & Frost Insulators & Asbestos Workers*, 469 F.2d 163, 165 (3d Cir. 1972), *cert. denied*, 412 U.S. 940 (1973). For whatever reason, Chavez elected not to do so. That is hardly a reason to refuse to accord the Act its preemptive effect, however, for this Court in *Jones* held a supervisor's state law claim preempted notwithstanding the supervisor's previous failure to appeal the NLRB Regional Director's denial of his

claim to the NLRB General Counsel. 460 U.S. at 673 & n.5. Thus, that supervisor, too, had no other remedy.

Moreover, despite the alleged lack of "direct protection" for supervisors under the Act, the fact remains that supervisors can and do file claims with and obtain relief from the NLRB. *See, e.g., Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989) (NLRB's decision ordering reinstatement of supervisor who had been disciplined for refusing to participate in an unfair labor practice affirmed and ordered enforced); *Gerry's Cash Markets, Inc. v. NLRB*, 602 F.2d 1021 (1st Cir. 1979) (ordering enforcement of NLRB decision finding supervisor had been demoted in violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

Finally, the rule Petitioners suggest — that claims of supervisors should not be preempted under *Garmon* — would leave a gaping hole in the preemption doctrine. This Court has explained that preemption is designed to prevent conflict between federal and state authorities:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. *To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.*

Garmon, 359 U.S. at 244 (emphasis added).

Where, as here, the employer's conduct toward a supervisor comes within the purview of the Act, that conduct is "plainly within the central aim of federal regulation" just as much as when an employer's conduct toward a *non*-supervisory employee is at issue. Therefore, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245.

The *Jones* Court rejected the Georgia Court of Appeals' reasoning that preemption was improper "because Georgia had a deep and abiding interest in protecting its citizens' contractual rights and because the cause of action, which sounded in tort, was so unrelated to the concerns of the federal labor laws that it would not interfere with the administration of those laws." 460 U.S. at 674-75. There, the supervisor's claim was held to be preempted because this Court refused to agree that the claim of a supervisor was of only "peripheral" concern to federal labor policy or that the claim was so deeply rooted in local law that the state's interest in enforcing its law overrode the resulting interference with federal labor law. *Id.* at 683. Petitioners here make similar arguments against preemption based on Arizona's interest in protecting its citizens and the fact that supervisors are not the central focus of the Act. Those arguments should be just as soundly rejected. Exempting supervisors' claims from the preemptive sweep of *Garmon* would, inevitably, result in a troubling state-federal conflict in labor law matters.

II.

THE SUPERVISOR'S CONTRACT CLAIM IS ALSO PREEMPTED HERE DUE TO THE IDENTITY OF THE CONDUCT CONSTITUTING THE BREACH.

Petitioners strive to draw a distinction between their breach of contract claim and their claims for wrongful discharge and interference with contract, contending that, even if the former are preempted, the latter is not. This argument must also fail. Chavez's breach of contract claim is preempted for the same reason that the other state law claims are preempted, for under this Court's precedent, it is the *conduct* at issue, not the legal theory in which a claim is couched, that is of concern in determining *Garmon* preemption.

A. Petitioners Mistakenly Focus Upon The Legal Theory Asserted, Rather Than The Conduct At Issue.

This Court has long since rejected the very argument Petitioners advance. In *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971), the Court, finding preemption under *Garmon*, observed that "[a]ssuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because it charged a breach of contract rather than an unfair labor practice is not tenable." The Court went on to explain that the focus must be on conduct, rather than the label attached to that conduct:

> *Pre-emption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.* Indeed, the notion that a relevant distinction

> exists for such purposes between a particularized and generalized labor law was explicitly rejected in Garmon itself.

Id. (emphasis added). The Court in *Jones* similarly found preemption under *Garmon* where the supervisor would have to prove "the same crucial element" to establish his state law claim as would be required to prove a violation of Section 8 of the Act. 460 U.S. at 682.

Relying on *Lockridge*, the Arizona court correctly ruled that "application of the preemption doctrine does not depend on the legal theories in which Chavez chooses to frame his claim." Appendix A at A-13; 897 P.2d at 732. Thus, "[r]egardless of the theory under which Chavez seeks to proceed," the salient fact is that "the basis for his claim remains conduct that arguably constitutes an unfair labor practice." Appendix A at A-13; 897 P.2d at 733. Because the "crucial elements of Chavez's state law claims and the showing to establish an unfair labor practice are the same in all fundamental respects," the Court of Appeals concluded that:

> *The issue that the NLRB could have decided and the corresponding remedy were no different than that which Chavez asks the state court to decide*: whether Copper State and Grimes engaged in unfair labor practices, and whether Chavez himself was thus entitled to an appropriate remedy.

Appendix A at A-13 through A-14; 897 P.2d at 733 (emphasis supplied). The breach of contract claim was thus held preempted.

Petitioners attempt to avoid this result by recharacterizing their breach of contract claim. They now emphasize their

allegation that Copper State and Grimes accused Chavez of unlawful discrimination. (Petition at 9.) A fair reading of their complaint, however, shows plainly that the gravamen of their breach of contract claim is that Andy Chavez was terminated by Copper State for refusing to commit unfair labor practices, *i.e.*, for refusing to discriminate against union employees. *See* Complaint at ¶¶ I through XIV (Appendix E at E-2 through E-5). The further allegation that "Defendant Grimes falsely accused Plaintiff of supporting the union and being disloyal to management" (Complaint at ¶ VII (Appendix E at E-3)) does not alter the fundamental nature of the conduct that is at issue.[2] The accusation of "disloyalty" to management is merely another way of stating that Chavez failed to discriminate against the supporters of the union, as management had requested. Because that conduct is identical with the conduct that would be at issue if Chavez lodged an unfair labor practices complaint with the NLRB, the court below properly held that the breach of contract claim was preempted by federal labor law for the same reasons that the wrongful discharge and interference with contract claims were preempted under *Garmon*.

B. The Decision Below Follows Established Law.

The Arizona Court of Appeals' ruling that the breach of contract claim is equally preempted is fully in accord with precedent from this Court and elsewhere. As discussed above, this Court's decisions in *Lockridge* and *Jones* teach that preemption is required where the conduct or "crucial element" is the same in the state law claim as in a claim under the Act. The court below also followed *Morris v. Chem-Lawn Corp.*, 541 F. Supp. 479 (E.D. Mich. 1982), in which an employee's breach of contract claim was held preempted because the basis of her claim

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2. Moreover, the breach of contract claim is asserted only against Copper State, not against Grimes. *See* Complaint at ¶¶ XII-XIII and prayer for relief of Count I (Appendix E at E-5).

was that her employer discharged her due to her support of organizing a union, an arguable violation of the Act. Relying on *Lockridge*, the *Morris* court held that none of the exceptions to *Garmon* preemption were applicable where:

> Plaintiff's claim in Count I [breach of contract] that she was discharged because of her support for a union, although couched in terms of breach of an employment contract, is identical to a claim of unfair labor practice in violation of § 8 of the NLRA.

541 F. Supp. at 483.

Significantly, the plaintiff in *Morris*, just as Petitioners here, claimed that her termination violated a contractual provision that an employee would not be discharged without cause. That claim, however, did *not* state a controversy distinct from that which could have been brought to the NLRB when the basis of the discharge was solely an unfair labor practice. *See also Young v. Caterpillar, Inc.*, 629 N.E.2d 830 (Ill. App. Ct. 1994) (employees' breach of contract claims held preempted by the Act where conduct at issue was arguably an unfair labor practice; thus contract claims were identical to claims the NLRB would have considered).

The cases Petitioners cite do not tell a different story. The decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), does not turn on the fact that a breach of contract claim was involved. Rather, *Belknap* illustrates the situation in which preemption is not required because the NLRB could provide no relief to the plaintiff bringing a state law claim. There, an employer hired replacement workers during a strike, promising them that the jobs would be permanent. Because the subsequent strike settlement required the employer to reinstate the strikers, the employer fired

the replacement workers, who then brought breach of contract and misrepresentation claims in state court. This Court held that the replacement workers' claims were not preempted despite the fact that the offer of permanent employment was arguably an unfair labor practice *vis-a-vis the strikers*, because the focus of the NLRB's determinations "would be on whether the rights of *strikers* were being infringed." 463 U.S. at 510 (emphasis supplied).

In other words, "[t]he Board would be concerned with the impact on strikers not with whether the employer deceived replacements." *Id.* Therefore, because the NLRB could provide no relief to the *replacement* workers, and because their state law action would not interfere with the Board's jurisdiction over the employer and the strikers, no preemption was found. *Id.* at 510-11. There is simply no parallel between *Belknap* and the instant case, for Petitioners do not dispute that the NLRB could have ordered Andy Chavez's reinstatement.

Petitioners' citation to *Sitek v. Forest City Enterprises, Inc.*, 587 F. Supp. 1381 (E.D. Mich. 1984), is somewhat puzzling, for there the court held that a wrongful discharge claim by a supervisor *was* preempted by the Act. The court considered the remaining claims on the merits in connection with its *Garmon* analysis and found them to be unsupported under state law. As the Arizona court recognized, however, determinations as to the merits of claims that are arguably preempted by the Act must be left to the NLRB, not the courts. Appendix A at A-14; 897 P.2d at 733, citing *Jones*, 460 U.S. at 681-82. *See also Garmon*, 359 U.S. at 244-45 (determinations whether activity regulated by the states is governed by § 7 or § 8 of the Act must be left in the first instance to the NLRB).

Finally, in *Kelecheva v. Multivision Cable T.V. Corp.*, 22 Cal. Rptr. 2d 453 (Ct. App. 1993), the California Court of Appeals

held that a supervisor's wrongful discharge claim was preempted by the Act where the plaintiff's allegations of discharge for refusing to discriminate against union workers involved exactly the same conduct that the NLRB would consider in determining whether the employer's conduct constituted an unfair labor practice. The *Kelecheva* plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims were not preempted, however, because *different conduct* would have been at issue in the two proceedings.[3] Accordingly, the court concluded that preemption was not required as to those two claims. *Kelecheva* does not represent a rule that breach of contract claims are somehow exempt from preemption under *Garmon*. Rather, the California decision is fully consonant with the ruling below, for here Petitioners allege the same core of conduct in their breach of contract claim that would be considered in determining whether Respondents' conduct constituted an unfair labor practice.

In sum, contract claims have no immunity from the broad sweep of the federal labor law preemption doctrine. The same need for uniformity, the centralized administration of federal labor law by the NLRB, and the avoidance of state-federal conflicts requires that contract claims be preempted under *Garmon* to the same extent as any other category of claims.

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3. For example, the plaintiff's breach of contract claim alleged that he had been terminated on "drummed-up" charges of insubordination and bad performance and without adequate notice. *Id.* at 455, 459. The breach of implied covenant claim alleged, *in addition to* the allegation of termination for refusing to discriminate against union workers, that the employer had failed to provide plaintiff with written warnings of performance deficiency, had failed to provide plaintiff with safety equipment and had fired plaintiff for bringing his safety concern to the attention of his superiors. *Id.* at 455.

CONCLUSION

Because Petitioners have presented no compelling reasons for this Court to accept jurisdiction, the Petition should be denied.

Respectfully submitted,

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